

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 3357 of 1993

with

SPECIAL CIVIL APPLICATIONS NOS . 7143 OF 1993

with

special civil applications nos. 7279 to 7281 of 1993

For Approval and Signature:

Hon'ble MR.JUSTICE R.BALIA. and
MR.JUSTICE A.R.DAVE

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1. Whether Reporters of Local Papers may be allowed to see the judgements?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the judgement?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

ARVIND MILLS LTD.

Versus

DEPUTY COMMISSIONER OF INCOME TAX (ASSESSMENT)

Appearance:

MR JP SHAH for Petitioner

MR B.B. NAIK WITH MR M.R. BHATT for Respondent No. 1

CORAM : MR.JUSTICE R.BALIA. and
MR.JUSTICE A.R.DAVE

Date of decision: 09/12/98

ORAL JUDGEMENT

Per Balia,J.

These five petitions raise a short and identical issue,.
The same has been heard and decided together.

In these petitions, the challenge is against the notices issued under section 148 of the Income tax Act initiating proceedings to reopen the assessment of the assessment year 1982-83 . The question is whether initiation of proceedings in March 1993 is beyond the period of limitation for initiating such proceedings provided under section 147-proviso or is covered by the limitation provided under section 149. Proviso to section 147 reads as under:

"Provided that where an assessment under sub-section (3) of section 143 or this section has been made for the relevant assessment year, no action shall be taken under this section after the expiry of four years from the end of the relevant assessment year, unless any income chargeable to tax has escaped assessment for such assessment year by reason of the failure on the part of the assessee to make a return under section 139 or in response to a notice issued under sub section (1) of section 142 or section 148 or to disclose fully and truly all material facts necessary for his assessment, for that assessment year."

The clear import of the proviso is that where there is no default on the part of the assessee in filing the return as required under the Act, either under section 139 or in pursuance of notice under sub section (1) of section 142 or section 148 or there is no failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment, for the assessment year in question, notwithstanding the reason for escape of income from assessment exists, action cannot be taken after expiry of four years from the end of relevant assessment year. However,in case, there is such failure on the part of the assessee to file return under section 139 or in response to notice issued under section 142 (1)or section 148 or there is failure to disclose fully and truly all material facts necessary for his assessment for that assessment year, the time limit for initiation of proceedings provided under section 149 applies. There is no dispute that if proviso to section 147 applies, initiation of proceedings is barred by time, otherwise the same is within limitation. Section 148 (2) requires the assessing officer to record in writing his reasons for initiating proceedings before issuing a notice .

The order sheets consisting of such reasons have been filed in each of the cases which are identical in terms.

For the purpose of noticing the reasons which have weighed with the assessing officer to initiate reassessment proceedings, we reproduce the reasons recorded in one of the cases viz. special civil application No. 3357 of 1993 by way of illustration:

"The return of income in this case was filed on 27.7.1982 declaring therein a total income of Rs. 28,58,380/- . The assessment for which was completed on 8.,2.1984 u/s 143 (3). Verification of the recorded reveal that the he assessee company had received refund of excise duty amounting to Rs. 60,30,182/- in the accounting year relevant to A.Y. 1982-83 for the duties paid on blended yarn manufactured by the assessee prior to 17.3.1972. The assessee company in the course of assessment proceedings had taken the stand that the said liability is not ceased liability, hence, cannot be taxed u/s 41 (1) of the Act as the matter is still sub judice, so the refund was not taxed u/s 41 (1) of the I.T. Act. However, in view of the Allahabad High court's decision in the case of Swarup Vegetable Products Industries Ltd (No.1) reported in 198 ITR 412 (All), the amount is taxable in the year under consideration itself,as it has been held by the court that the central excise duty refund received by the assessee or passed on to the clients could not be excluded from the income on the mer fact of pending of writ petition. In view of this, the excise duty refund remained to be taxed to the above extent of Rs. 60, 30, 182/- and hence there is an escapement to that extent in the A.Y. 1982/83 . Action u/s 147 of the I.T. Act is, therefore, initiated for A.Y. 1982/83 after obtaining prior approval of the CIT,Gujarat -I."

The reasons recorded by the assessing officer clearly disclose that the assessing officer did not entertain any belief that income has escaped assessment because there has been any failure on the part of the assessee to file return. Regular assessment has been made under section 143. Reasons also disclose that the assessing officer believed that income has escaped assessment in the original assessment on account of not including the amount of refund of excise duty during the assessment year in question because the assessing officer had accepted the plea of the assessee that since the matter about refund was sub judice and the question of refund has not become and liability to pay excise duty has not

come to end as the assessee was maintaining accounts on mercantile basis, the said amount cannot be brought to tax under section 41. However, subsequent to that, as a result of Allahabad High court judgment, in Swarup Vegetable Products (*supra*), A.O.thought that his earlier decision has been erroneous as a result of which ,the income has escaped assessment.

Is is a clear case where the assessing officer has no reason to link escapement of income from assessment with non-disclosure of any material fact necessary for his assessment at the time of original assessment but is due to erroneous decision on the question of law by the assessing officer. Thus, the case is squarely covered by the proviso to section 147 and not section 149. Initiation of proceedings under proviso being clearly barred by time , the assessing officer could not have assumed jurisdiction by issuing notice under section 148 in respect of assessment year 1982-83.

As a result, all these petitions succeed. The impugned notice under section 148 read with section 147 in each case is quashed. Rule is made absolute with no order as to costs.
